Supreme Court, U.S.
FILED
DEC 29 1994
OFFICE OF THE CLERK

No. 94-972

In The Supreme Court of the United States

October Term, 1994

TRI-STATE MACHINE, INC.,

Petitioner,

v.

NATIONWIDE LIFE INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF GRANT OF TRI-STATE MACHINE, INC.'S PETITION FOR WRIT OF CERTIORARI

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia
State Capitol
Room 26, East Wing
Charleston, WV 25305-0220
(304) 558-2021

12

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IDENTITY OF *AMICUS CURIAE* 1

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. Background 3

B. West Virginia has an Important Interest at Stake ... 5

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Page

Ball v. Life Planning Services, Inc., 421 S.E.2d 223 (W. Va. 1992) 7

Hayseeds, Inc. v. State Farm Fire and Casualty, 352 S.E.2d 73 (W. Va. 1986) 6

Jenkins v. J. C. Penney Casualty Ins. Co., 280 S.E.2d 252 (W. Va. 1981) 3, 4, 5, 6

Mutafis v. Erie Ins. Exch., 561 F. Supp. 192 (N.D. W. Va. 1983), *aff'd*, 775 F.2d 593 (4th Cir. 1935) 4, 5

Mutafis v. Erie Ins. Exch., 775 F.2d 593 (4th Cir. 1985) 6

Weese v. Nationwide Ins. Co., 879 F.2d 115 (4th Cir. 1989) 4, 5

STATUTES:

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144 3

McCarran-Ferguson Act, 15 U.S.C. § 1101 *et seq.* (1988) .. 3

West Virginia Unfair Trade Practices Act, W.Va. Code §§ 33-11-1 *et seq.* 3, 4

W. Va. Code § 33-11-6 4

W. Va. Code § 33-2-3 4

W. Va. Code § 33-2-11 4

IDENTITY OF AMICUS CURIAE

This brief is filed by the Attorney General of the State of West Virginia as an *amicus curiae* on behalf of the State of West Virginia. Consent of the parties to the filing of this brief is not necessary under Rule 37.5 of the Rules of the Supreme Court.

INTEREST OF AMICUS CURIAE

West Virginia has an interest in seeing that its laws have force and effect. West Virginia has an interest in limiting federal involvement in matters of traditional state concern, such as insurance. Both employers and employees in the State of West Virginia have an interest in minimizing the cost of employer-sponsored health care. West Virginians, the West Virginia Attorney General and the West Virginia Insurance Commissioner all have an interest in seeing that West Virginia businesses are protected from unfair and fraudulent insurance practices.

Other than these important general interests, West Virginia and its Attorney General have no specific interest, proprietary or otherwise, in the parties to this action or their dispute.

SUMMARY OF ARGUMENT

West Virginia has a strong interest in deterring insurance fraud. The West Virginia Attorney General, like the Attorney General of any State, cannot be effective as the sole responsible body for policing and enforcing the sale of all employee benefit insurance products within a state. Insurance purchasers, having a direct, personal interest in the terms and conditions of an insurance contract, are best equipped to prevent fraud and abuse in the insurance industry due to their knowledge and familiarity with the terms and conditions of the insurance products which they have purchased.

The individual and collective ability of insurance purchasers to bring suit to redress unfair and fraudulent practices in the sale of insurance is the most effective means of ensuring that insurance sellers will comply with state insurance law. To that end, it is of vital concern to the State of West Virginia that Tri-State Machine, Inc. (''Tri-State'') have the ability to hold Nationwide Life Insurance Company (''Nationwide'') accountable for Nationwide's alleged breaches of contract and violations of West Virginia insurance law. Otherwise, insurance sellers will be able to protect themselves from suit by raising the ERISA preemption shield and will have little or no incentive to comply with state law in the sale of employee benefit insurance products.

The Fourth Circuit majority opinion in this case has a significant negative impact on the interest of West Virginia employers and employees. That opinion extends the scope of ERISA preemption to run-of-the-mill insurance purchasers so as to void West Virginia state laws and negate private causes of action in the context of employer-sponsored health care.

The case in question should be heard by the Supreme Court of the United States because it has substantial repercussions affecting state insurance law and the sale of insurance products throughout the United States.

ARGUMENT

A. Background

Congress has unequivocally spoken on the subject of insurance regulation and has plainly provided that the States shall have the exclusive authority to regulate the business of insurance. The McCarran-Ferguson Act provides that " . . . the continued regulation and taxation by the several States of the business of insurance is in the public interest, and . . . silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1988).

The Employee Income Retirement Security Act of 1974 broadly preempts state law, but excepts from preemption state laws which regulate insurance. 29 U.S.C. § 1144(b)(2)(A) (1988).

As the West Virginia Supreme Court of Appeals has recognized, West Virginia has a very strong interest in protecting West Virginia residents from unfair and fraudulent insurance practices. *Jenkins v. J. C. Penney Casualty Ins. Co.*, 280 S.E.2d 252 (W. Va. 1981). This interest is protected through state common law and statutory rights.

West Virginia's Unfair Trade Practices Act, W. Va. Code §§ 33-11-1 *et seq.* (the "Act"), is found within the chapter of the West Virginia Code entitled "Insurance." The Act was derived from the model act proposed by the National Association of Insurance Commissioners. The Act was promulgated pursuant to

the McCarran-Ferguson Act in an attempt to protect the consumers of insurance products against unfair and fraudulent insurance company practices. W. Va. Code § 33-11-1 (1974).[1]

Although the West Virginia Insurance Commissioner has the principal power to enforce the Unfair Trade Practices Act W. Va. Code § 33-2-3 (''Duties of commissioner''); 33-2-11 (''Enforcement of order; revocation of licenses; court action''); 33-11-6 (''Violations, cease and desist and penalty orders and violations thereof''), these administrative powers were not intended to be the exclusive remedy for violations of the statute. *Jenkins v. J. C. Penney Casualty Ins. Co.*, 280 S.E.2d 252, 257 (W. Va. 1981).

Rather, courts have appropriately determined that an implied private cause of action exists for violation of the Act because of West Virginia's strong interest in thwarting unfair insurance practices. *E.g., id.; Mutafis v. Erie Ins. Exch.*, 561 F. Supp. 192 (N.D. W. Va. 1983), *aff'd*, 775 F.2d 593 (4th Cir. 1985). Thus, private parties have the right to bring causes of action directly against insurance companies, for compensatory and punitive damages, to remedy violations of the Act. *Jenkins v. J. C. Penney Casualty Ins. Co.*, 280 S.E.2d 252 (W. Va. 1981); *Mutafis v. Erie Ins. Exch.*, 561 F. Supp. 192 (N.D. W. Va. 1983), *aff'd*, 775 F.2d 593 (4th Cir. 1985); *Weese v. Nationwide Ins. Co.*, 879 F.2d 115 (4th Cir. 1989).

---

[1]That section states:

§ 33-11-1. Declaration of purpose.

The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the act of Congress of March ninth, one thousand nine hundred forty-five (Public Law fifteen, seventy-ninth Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Similarly, West Virginia law recognizes other common law causes of action, such as breach of the covenant of good faith and fair dealing, that serve to protect West Virginians from unfair and fraudulent insurance practices. *E.g., Weese v. Nationwide Ins. Co.*, 879 F.2d 115 (4th Cir. 1989).

B. West Virginia has an Important Interest at Stake

West Virginia has a strong interest in seeing that its state laws regulating the sale of insurance are saved from preemption. Many courts, including the Supreme Court of West Virginia, have recognized a very important fact: The right of a person injured as a result of unfair insurance practices to recover compensatory and punitive damages and attorneys fees acts as a strong deterrent against wrongful conduct. *See, e.g., Jenkins v. J. C. Penney Casualty Ins. Co.*, 280 S.E.2d 252, 258 (W. Va. 1981); *Mutafis v. Erie Ins. Exch.*, 561 F. Supp. 192, 200 (N.D. W. Va. 1983), *aff'd*, 775 F.2d 593 (4th Cir. 1985).

The West Virginia government expends a substantial amount of time, energy and taxpayer funds to monitor insurance company practices and to enforce the Unfair Trade Practices Act, but these measures are not a sufficient deterrent to unfair and fraudulent sales practices. West Virginia's regulation of insurance sales practices can be truly effective only when buttressed by the right of employers and other insurance purchasers to bring actions in their own right.

As one court stated, the potential for liability created by recognizing a private cause of action is a deterrent as well as "an effective tool in securing compliance with the Act." *Mutafis*, 561 F. Supp. at 200.

In the case at issue, it is alleged by a West Virginia employer that Nationwide Life Insurance Company fraudulently deceived the employer in the sale of an insurance product and the computation of insurance premiums. Under West Virginia

state laws, if these allegations were proven to be true, the employer would have a private cause of action under the Unfair Trade Practices Act. Such insurance purchaser would also have a contract action for breach of the covenant of good faith and fair dealing, as well as tort claims.[2]

Because of the number of insurance companies doing business in West Virginia, the variety of insurance products marketed, and the sheer volume of insurance sold to West Virginia residents, the right of purchasers of insurance to enforce provisions of the Act as they affect the conduct of insurance companies in any particular situation is important to the overall effectiveness of the Act.

The more an employer is protected against unfair insurance practices, the greater the benefits the employer can provide for the same expenditure. In the case at issue, Tri-State would have to pay less for insurance if Nationwide, the company providing health care coverage, were defeated in its alleged attempt to fraudulently collect more premiums than due.

The Fourth Circuit opinion in question insulates an insurance company from fraudulent sales practices under the rationale that this is a matter of important federal concern that Congress intended to preempt. To the contrary, Congress intended to insulate insurance companies against claims by employee benefit plan beneficiaries and participants seeking to enhance their federal remedies provided by ERISA. No such similar rationale exists to protect insurance companies from their misdeeds in selling insurance and calculating insurance premiums from an employer who voluntarily sponsors an ERISA plan.

---

[2]The remedies available under state law could include punitive damages and attorney's fees if Tri-State were able to prove wilful, malicious or intentional conduct. *See Jenkins v. J. C. Penney Casualty Ins. Co.*, 280 S.E.2d 252, n.12 (W. Va. 1981); *Mutafis v. Erie Ins. Exch.*, 775 F.2d 595 (1985); *Hayseeds, Inc. v. State Farm Fire & Casualty*, 352 S.E.2d 73 (W. Va. 1986).

The West Virginia Attorney General is not seeking herein to challenge the rationale of cases holding that state law remedies of *employees* who are benefit plan participants or beneficiaries are preempted from asserting state law claims, thereby decreasing the cost of funding employee benefit plans. *See, e.g., Ball v. Life Planning Services, Inc.*, 421 S.E.2d 223 (W. Va. 1992). In such cases, the West Virginia Act is not implicated because plan beneficiaries and participants were not designed to be afforded protection from insurers. Such beneficiaries and participants would have had no direct contact with the insurance company in the marketing and implementation of the insurance contract. Moreover, preemption in such instances meets with Congressional intent of encouraging employers to create benefit plans because costs are minimized when actions are limited and damages are capped.

The opposite is true, however, where an *employer* who sponsors a plan brings an action against an insurance company for fraudulent sales practices. If this type of action is preempted, or if it is held that an employer's sole remedies exist under ERISA, the cost of providing health care benefits actually increases, creating a disincentive for employers to sponsor plans. Further, the Act is rendered completely ineffective notwithstanding its clear design to protect insurance purchasers.

Under the Fourth Circuit opinion in this case, employers not only lose their state court remedies, but insurance companies are completely insulated from state laws and regulations designed to protect purchasers of insurance. The Fourth Circuit analysis completely undermines the rights of employers who have chosen to purchase insurance as part of their voluntary sponsorship of health care plans.

Also, although the issue has yet to be decided definitively, if ERISA were to apply to the exclusion of state law, it would be debatable whether an employer has an action at all and, if so,

what remedy would be appropriately crafted under ERISA. If the "delicate balance" of ERISA's remedial scheme is implicated, what remedies should be created to protect an employer in situations like this, and what amount of damages would be permitted?

West Virginia respectfully maintains that this is a matter which should be left to the States. It is a matter of negligible federal concern and of paramount importance for states like West Virginia. States should have the option to regulate the relations between insurance purchasers/employers and insurance companies, and to determine for themselves what remedies should apply.

West Virginia has a vital interest in the matters that are at issue in this case. West Virginia employers pay millions of dollars to insurance companies for insurance products which serve to fund health care plans for the benefit of West Virginia employees.

It is very important to combat unfair insurance practices and ensure the overall effectiveness of the Unfair Trade Practices Act. To that end, the private remedies provided under state statutes and common law which regulate insurance practices must be preserved, especially where they do not conflict with the fundamental goals and objectives of ERISA.

CONCLUSION

West Virginia, through its Attorney General, urges the Court to issue a writ of certiorari and decide this matter of important public concern.

Respectfully submitted,

/s/ DARRELL V. MCGRAW, JR.

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia
State Capitol
Room 26, East Wing
Charleston, WV 25305-0220
(304) 558-2021